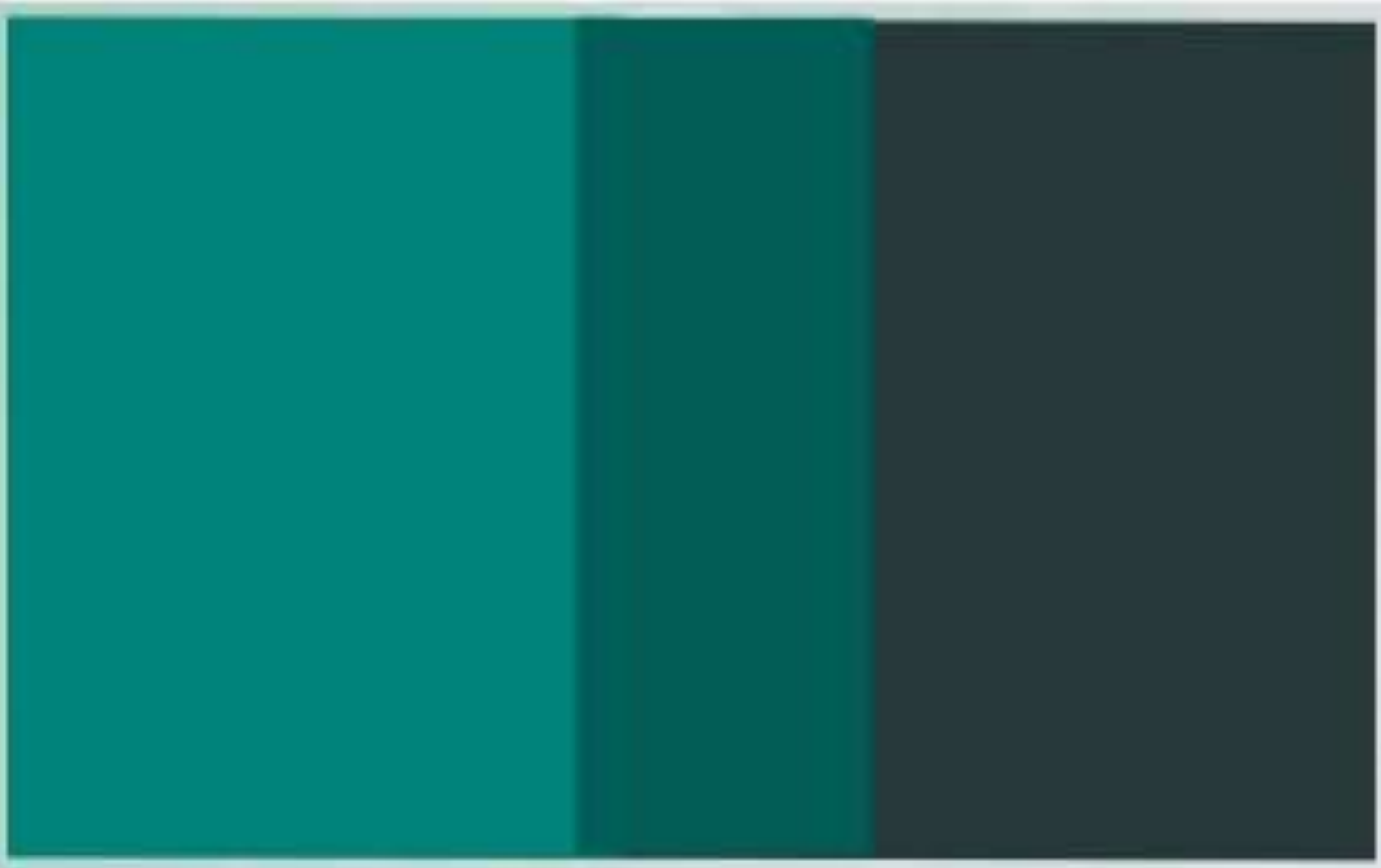
KEVIN MARTIN OGWEMOH

LEGAL NEWSLETTER

A COMPREHENSIVE REVIEW OF THE COMPANIES AND ALLIED MATTERS ACT 2020



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It came as great news indeed that President Muhammadu Buhari has finally signed the Companies and Allied Matters (Repeal and Re-enactment) Bill into law as the Companies and Allied Matters Act (CAMA) 2020 after what seemed like forever.[1] The extant Companies and Allied Matters Act (CAMA) had been in operation for 30 years without any substantial improvement despite constant developments in the global corporate practice landscape, and had over time become outdated. This has inevitably presented obstacles to the seamless incorporation and operation of businesses in the country, especially when compared with what is obtainable globally.

The signing into law of the new CAMA is, therefore, undoubtedly one of the most impactful business/economic upheavals in the country in the past three decades.[2] It will help to implement a catalytic modern regulatory framework for businesses while also improving the country's ease of doing business and achieving global competitiveness in line with the Federal Government's Economic Recovery and Growth Plan (ERGP 2017 – 2020) which targets Nigeria ranking in the top 70 in the World Bank's Doing Business Index by 2023.[3]

Against this background, this article highlights the prime imports of the Act as follows:

1) Provision for Single Member/Shareholder Companies

One of the initiatives of the new CAMA is the introduction of single shareholder private companies. **Section 18(2)** of the Act makes it possible to incorporate a private company with only one member or shareholder as against the requirement of at least two under the extant law. This is in line with modern day global corporate practice and will go a long way to encourage the growth of startups; micro, small and medium enterprises (MSMEs); and investment by foreign companies that may be interested in sole ownership.

2) Common Seal No Longer Compulsory for Companies

Under CAMA 1990, every company is mandated to have a common seal but this is no longer the case as **section 98** of the new CAMA makes it optional for companies in line with international best practices.

3) Electronic Filing & Issue of Documents and Electronic Share Transfer

In recognition of the advancements in technology and its adoption in general corporate practice globally, the new CAMA makes provisions for electronic issue and filing of documents and electronic share transfer. Documents required to be filed with the CAC for registration can now be filed electronically through an e-portal provided by the CAC for same. In that regard, **section 861** of the new CAMA provides that certified true copies (CTC) of electronically filed documents are admissible in evidence, with equal validity with the original documents. Also, **section 176(1)** provides that instruments of transfer of shares shall include electronic instruments of transfer.

4) Electronic (Virtual) Meetings for Private Companies

Under **section 240(2)** of the new Act, private companies are now permitted to hold their general meetings virtually/remotely, provided that such meetings are conducted in accordance with their Articles of Association. This will not only aid affected companies in these pandemic times but also bring Nigerian corporate practice in line with modern global economic and business realities. It is, however, noteworthy that this same praiseworthy privilege is not extended to public companies. This may probably be due to the perceived large size of public companies.

5) Introduction of Limited Liability Partnerships (LLP) & Limited Partnerships

The new CAMA introduces two new forms of business entities into Nigerian corporate law –the Limited

Liability Partnerships (LLP) and the Limited Partnership (LP) which are also, like a company, meant to exist differently and separately from their members. These new forms of business combinations enjoy the unique privilege of the organisational flexibility and tax benefit status of a partnership and the limited liability of companies. Thus, partnerships that wish to convert to or register as LLP will enjoy the following benefits:

a. Protection of members' personal assets from the liabilities of the business since LLP's are separate entities from their members;

b. The operation of the partnership and distribution of profits is determined by written agreement between the members. This may allow for greater flexibility of the business;

c. The LLP is deemed to a legal person. It can buy, rent, lease, own property, employ staff, enter into contracts and be held accountable for acts and omissions in its own name; and

d. By registering the LLP at the Corporate Affairs Commission, other persons can be prevented from registering the same business name.

6) Replacement of Authorised Share Capital with Minimum Issued Share Capital

Another innovation in the Act is the replacement of authorized share capital with minimum share capital by **sections 27 and 124** of the Act. With this, promoters of a business do not need to pay for shares that they do not need at a specific time, neither do shareholders have to bear the brunt of frontloaded stamp charges on share capital paid up front.

It is also worth noting that **section 27 (2)** of the Act has increased the minimum share capital from NGN10,000 to NGN100,000 in the case of a private company and from NGN500,000 to NGN2,000,000 in the case of a public company. This increase in minimum share capital is long overdue as the amounts stipulated in the repealed Act are no longer in tune with present realities.

7) Appointment of a Company Secretary Made Optional for Private Companies

Under the 1990 Act, every company is required to have a Secretary. But this is no longer the case under the new CAMA. **Section 330(1)** of the Act has now restricted the mandatory appointment of a Secretary to only public companies, thereby making it optional for private companies. This we expect will reduce both the regulatory and financial burden on micro, small and medium enterprises (MSMEs) and Single Shareholder Companies.

It is, however, hoped that the absence of company secretaries (who are mostly lawyers) in those small companies will not negatively affect their regulatory compliance. It is our humble opinion that, notwithstanding the provisions of the new CAMA, companies should endeavour to employ or retain the services of legal practitioners in order to meet up with their regulatory compliance issues.

8) Company Share Buyback/Repurchase

Under the extant CAMA, a company is restricted from acquiring its own shares except for rare situations such as to redeem preference shares, settle a debt, and to eliminate fractional shares. CAMA 2020 has now lifted such inhibitions. A combined reading of **sections 184 to 187** now allows companies to buy back their issued shares pro rata from existing shareholders pursuant to a court sanctioned scheme, on the open market, or from the company's employee stock option pool. In order to do this, however, certain conditions laid down under the above sections must be met, namely:

(a) the articles of association of the company must permit such acquisition; (b) there must be a special resolution of the company approving the acquisition; (c) the shares must be fully paid up; (d) the acquisition must be published in two national newspapers; (e) a declaration of solvency must be made by the directors of the company; (f) payment for the repurchase must be made from distributable

Profits; and (g) the company must not hold more than 15% of its issued shares as treasury shares i.e. shares reacquired from shareholders. It is our belief that this new and innovative provision will prove particularly useful in enhancing Nigeria's private equity (PE) and venture capital (VC) market as it will increase the exit options available to these PE and VC investors.

9) Financial Assistance to Shareholder's/Prospective Shareholder's Acquisition of Shares Now Permitted

Under CAMA 1990, it was unlawful for a company to render financial assistance to a shareholder or potential shareholder seeking to acquire shares in the company, even as an indemnity incentive to private equity investors. This restriction has now been lifted under **section 183** of CAMA 2020. **Section 183(3)(e) and (f)** of the Act now allow companies to render such financial assistance in the acquisition or proposed acquisition of their shares where (i) it is done pursuant to a court sanctioned scheme of arrangement, merger or restructuring of the company; or (ii) the principal purpose in giving the assistance is not to reduce or discharge any liability incurred by a person acquiring shares in the company or its holding company, but is merely incidental to a larger purpose of the company, and the assistance is given in good faith in the interests of the company.

In addition, **section 183(4)** provides that a private company may render financial assistance for the acquisition of its shares, or that of its holding company if it is a subsidiary, where (a) it is approved by a special resolution; (b) the net assets of the company are not reduced or, if they are reduced, the assistance is provided from distributable profits; and (c) the directors of the company make a statutory declaration in the prescribed form before the financial assistance is provided.

10) Introduction of Statement of Compliance and Removal of Declaration of Compliance made by Legal Practitioners

Under the old CAMA, to incorporate a company, a promoter will be required to submit to the Corporate Affairs Commission ("CAC") a number of documents which include a Statutory Declaration of Compliance attested to by a Legal Practitioner. This is no longer the case under the new CAMA as **section 40(1)** replaces that with a Statement of Compliance which can be signed by an applicant himself or his agent, confirming therein that the legal requirements for registration have been duly complied with. As such, the newly introduced Statement of Compliance need not be signed by a lawyer.

11) Restriction on Multiple Directorship in Public Companies

In **section 307(2)**, the new Act prohibits a person from being a director in more than five public companies at a time. And by **section 307(3)**, any person who is presently a director or becomes a director in more than five public companies at any time is required to, at the next annual general meeting (AGM) of the companies after the expiration of two years from the commencement of the Act, resign from being a director from all but five of the companies.

This provision is clearly geared towards reducing conflict of interests and enhancing the performance of directors. This restriction of multiple directorships to five companies will no doubt ensure more focus; enhanced productivity; efficiency; and effectiveness among the directors. Directors will no longer sit on boards to merely improve the image of the company but solely to ensure a better and optimal company direction and performance.

12) Independent Directors Now Compulsory for Public Companies

Another innovation in CAMA 2020 is the requirement under **section 275** for public companies to have at least 3 independent directors on their board. The section provides further that to qualify as an

independent director, it must be shown that in the two years preceding his nomination, the said director and/or his relative (a) was not an employee of the company; (b) did not make or receive payments from the company exceeding NGN 20 million nor own (directly or indirectly) more than 30% of the shares of an entity that made to or received such a payment from the company; (c) did not own (directly or indirectly) more than 30% of the shares of the company; and (d) was not engaged (directly or indirectly) as an auditor for the company.

13) Governance of Public Companies and Shareholder Protection

Section 265(6) provides that a Chairman of a public company cannot double as Chief Executive Officer (CEO). This provision, which has actually been in effect in the UK and some other jurisdictions for a while now, is a welcome development in that it will serve to eliminate conflict of interest problems that may arise from having the same person performing those two important roles e.g where the Board of Directors is to evaluate the performance of executives (of which the CEO is one) or to vote to increase or decrease executive pay (in which case the CEO will be voting on his/her own pay).

14) Suspension/Removal of a Director Is Now a Criteria for Disqualification

Aside from the procedure for removal of directors provided under CAMA 1990, CAMA 2020 in section 288(c) adds that directors who are suspended or removed in a general meeting of the company in accordance with the Act will be disqualified from being directors of other companies.

15) Disclosure of Shareholding Capacity and Significant Control in companies

Sections 119 and **120** of the new CAMA have introduced new transparency provisions with regards to ownership stake in companies.

Section 119 mandates every person with significant control over a company to disclose the capacity in which their shares are held – whether as a beneficial owner or as a nominee of an interested person.

Similarly, **section 120** provides that a person who is a substantial shareholder in a public company (i.e. holding - either by himself or by his nominee - shares in the company which entitles him to exercise at least five per cent (5%) of the unrestricted voting rights at any general meeting of the company) is required to disclose such substantial shareholding to the company within a stipulated time.

These new disclosure provisions are geared towards enhancing transparency in company shareholding and combating money laundering, terrorism financing and other forms of illicit financial flows (IFFs).

16) Exemption from Audit and Appointment of Auditors

Unlike under the former Act where every company was required to appoint an auditor or auditors at its Annual General Meeting ("AGM") to audit the financial records of the company, **section 402** of the new CAMA has modified this to exempt small companies and companies that have not carried out any business since incorporation, except for insurance companies, banks or any other company as may be prescribed by the CAC.

This provision is reasonable owing to the fact that a company that has not started business will definitely have no financial records to be audited. Unnecessary cost will be saved in this regard.

17) Prescription of Model Articles for Adoption by Companies

Under the old Act, every company was required to register an Article of Association in line with the form and contents prescribed in the Act during incorporation. In the new Act, however, **sections 32, 33 and 34** provide that a company may elect not to register an Article of Association, in which case it will be deemed to have adopted the Model Articles prescribed in the Act for a company of its description. This is undoubtedly one of the direct benefits that promoters would enjoy during registration. There will be no need to stress over the draft of articles as same can easily be adopted depending on the type of company sought to be registered.

18) Consent of the Attorney-General of the Federation No Longer Required to Incorporate a Private Company Limited by Guarantee

Again, unlike what is obtainable under the old regime, CAMA 2020 in **section 26** dispensed with the requirement for the mandatory approval of the Attorney-General of the Federation (AGF) for the incorporation of a company limited by guarantee, providing instead that where the CAC is satisfied with contents of the Memorandum and Articles of Association submitted by the applicants, it shall cause the application for registration of such a company to be advertised in a prescribed form in three (3) national daily newspaper, and inviting possible objections from the public. This will be the case where the AGF fails to give his approval within 30 days. Therefore, the procedure is to seek the AGF's approval first and where such approval is not given as provided by **section 26(5) & (6),** promoters will resort to **section 26(7)** to circumvent the need for his approval.

19) Merger of Incorporated Trustees (NGOs)

Section 849 of the new CAMA now allows two or more associations with similar aims and objectives to merge under such terms as may be prescribed by regulation by the CAC. This will enable such associations to pull resources together and pursue their goals more appropriately. This is a welcome innovation as many NGOs and other similar organizations with good objectives do not really have the requisite financial resources to pursue and achieve their goals. With this innovation in the Act, we foresee a lot of positive mergers for enhanced service delivery and a reduction in the proliferation of NGOs.

20) Reduction in Filing Fees for Registration of Charges

Section 223(12) of the new Act has reduced filing fees for registration of charges to 0.35% of the value of the charge, representing a 65% reduction in the fees payable for same under the old regime. The Act, however, goes further to provide that the Minister of Trade and Investment may specify any other amount by a publication in a Gazette. This is a great relief for many engaged in mortgage and other similar transactions. We only hope the Minister's publication in the gazette would not raise the amount beyond the benchmark as provided by CAMA.

21) Business Rescue Provisions for Insolvent and Distressed Companies

The new Act also introduces a framework for rescuing a company in distress and to keep it alive as against allowing such entity to become insolvent and be wound up. Insolvency Provisions are introduced with respect to Company Voluntary Arrangements (**Sections 434 to 442**), Administration (**Sections 443 to 459**), and Netting (**Sections 718 to 721**). This marks the dawn of a new era in insolvency practice in the country.

22) New Threshold for Insolvency/Winding Up

The new Act has also updated the threshold for declaring a company insolvent and winding it up. As against the provision that a company may be wound if it is unable to pay its debts of a sum exceeding a meager N2,000 under the extant Act, the new Act in **section 571 and 572** raises this threshold to N200,000. This development will no doubt forestall the proliferation of winding up proceedings on account of a company owing just N2,000 as was hitherto possible under the repealed Act.

23) Provision for Insolvency Practitioners

The Act in **sections 704 – 709** also makes provisions for the definition of, and qualification and authorization to act as an insolvency practitioner. It also vests in the CAC the power to declare and recognize a body as a professional body for the purpose of the provisions of the aforementioned sections of the Act on insolvency. This innovation is very instructive and purposeful. It will do away with many unqualified and inexperienced persons who simply take up insolvency briefs because of the gains without necessarily being versed in insolvency practice. With a clear definition of insolvency practitioners and their expected

qualifications, a lot has already been achieved in repositioning insolvency practice in the country.

24) Public companies to display their Audited Accounts on their Websites

Yet another provision in the Act geared towards promoting corporate transparency and accountability is **section 374(6)** which requires each public company to keep its audited accounts displayed on its website. With just a click, members of the public can now access the financial status of public companies. The availability of such sensitive document to the public will enable prospective investors to take informed decisions before going into any business relationship with such companies.

25) Small Companies Can Now Have Just One Director

Section 271 of the new Act now allows small companies to have just one (1) director, having exempted them from the requirement of having at least two (2) directors. As is the case with single shareholder companies, this will prove particularly beneficial to startups and MSMEs.

26) Private Companies Exempted from Maintaining Register of Secretaries

Whereas under the old CAMA, every company is required to maintain a register of secretaries, the new Act under **section 336** makes it mandatory only for public companies.

27) Recognition of Shares Held Under Trusteeship

The New Act recognizes trusteeship in respect of shares under **section 27(3)**. That section mandates any person holding shares in trust for another person under a trust arrangement to disclose that the shares are held under a trust and also the beneficiary's name. In view of this, it will be necessary to amend the memorandum and articles of association ("MEMART") of companies whose shareholders are caught by this provision to reflect all existing shares held under trust and their beneficiaries.

It is important to note, however, that the Act speaks only of trusts already in existence as at the time of the incorporation (and subscription to the MEMART) of a company and is silent on the disclosure of trust arrangements that are created thereafter or any shares that are subsequently acquired under a trusteeship investment. In such a case, logic suggests that the same provision will apply to any such arrangements especially in view of the fact that the restriction in **section 86** of the old Act which prohibited the recognition of trust over shares in the register of members or the records of the CAC was left out of CAMA 2019. Consequently, trust arrangements entered into in respect of shares of a company may now be formally recognized and recorded in the register of members and the records of the CAC.

It is our expectation that these amendments will engender a more coherent regime for shareholding in the country and will also allow law enforcement and tax authorities to trace the beneficial ownership of shares.

28) CAC Now Also Entitled to Notice of Meetings of Public Companies

Another notable amendment to the old Act is the provision of **section 243** of the new Act which makes the Corporate Affairs Commission one of the parties entitled to receive notice of general meetings of public companies. This is a particularly interesting amendment as such a requirement was previously only extended to incorporated trustees.

29) Pre-emptive Rights of Shareholders (Right of First Offer and Refusal) of Private Companies

As against the regime under the old Act, the new Act no longer mandates private companies to restrict the transfer of their shares. See **section 22(2)**. But they may, subject to the provisions of the articles of association, still do so by providing that:

a) assets of the company valued at 50% of the total value of its assets shall not be sold or disposed of without the consent of all the shareholders;

b) a shareholder shall not sell his shares to non-shareholders without first offering them to existing shareholders; and

c) a shareholder, or a group of shareholders acting in concert, cannot sell or agree to sell more than 50% of the shares in the company to a non-shareholder, unless that non-shareholder has offered to buy the shares of other existing shareholders on the same terms.

These provisions will invariably protect existing shareholders from unnecessary dilution and forceful acquisition through third party arrangements, and so will prove particularly popular in the Mergers and Acquisition and Private Equity and Venture Capital industry.

30) New Provision for Profit Payable as Dividend (Distributable Profits)

Section 427 of CAMA 2019 restricts the distributable profits of a company (i.e. profits available for payment of dividends) to just the company's accumulated, realized profits which have not been previously distributed or capitalized less the accumulated, realized losses which have not been previously written off in a lawful reduction or capital reorganization. This means that profits agreed to be used for recapitalization will not be accumulated nor considered distributable profit, and losses from legitimate capital reduction or reorganization will not affect distributable profits, in a financial year.

31) New Provision For Unclaimed Dividends

The new Act also amends the regime for unclaimed dividends of the company by shareholders. **Section 429(1)** of the new Act provides that where dividends paid by a company remains unclaimed, the company must publish in two national newspapers a list of the unclaimed dividends and the names of the persons entitled to them, and attach this published list to notices sent for "**each subsequent**" AGM of the company. It is only after the expiration of three months of the publication and the notice that the company may then toe the normal line of investing the unclaimed dividends outside the company for its own benefit, in which case no interest shall accrue on the dividends against the company. Therefore, as against just sending a list of the unpaid shareholders along with the notice for he "**next**" AGM as obtainable under the old Act, the requirement for publication in two national newspapers and notification to each subsequent AGM is a welcome development with regards to the regime for the re-investment of unclaimed dividends in Nigeria.

32) New Regime for Allotment of Shares (Delegation to Directors)

Just as under the old Act, the power to allot shares remains vested in the shareholders of the company in general meeting under the New Act. The New Act, however, goes further to provide for different regimes for the allotment of shares in public and private companies under **Section 149**. The Act now restricts this provision to private companies subject to any restriction or direction that may be imposed in the articles or by the company in general meeting. As for public companies, the authority to delegate power to allot shares can no longer be exercised by shareholders; and the power to allot shares is still subject to the provisions of the Investment and Securities Act 2007.

33) Company's Validation of Improperly Issued Shares

As against the old regime, where shares are improperly issued or allotted, the company no longer needs to approach the court to validate the shares. **Section 148** of the New Act permits the company itself to, within 30 days of an application by the

affected shareholder; validate the issuance/allotment of such shares by a special resolution. However, where the company fails to do so, the affected shareholder may then apply to court for validation.

34) Disclosure of Managers' Remuneration Now Ordinary Business at AGM

The ordinary business conducted at the annual general meeting has been amended by the new Act in **section 238 and 257** to include the disclosure of the remuneration of managers of the company.

35) Application by Foreign Companies for Exemption now to Minister of Trade

Under **section 80** of the new Act, a foreign company intending to carry on business in Nigeria without registering as a company in Nigeria can now apply to the Minister of Trade for exemption rather than to the Council of Ministers as was provided in the old Act. If granted the exemption, the company is mandated to notify the CAC within thirty (30) days or be liable to a fine. The company must also file an annual report to the CAC.

36) Substantial Shareholders Can Now Act as Trustees in a Debenture Trust Deed

Another notable amendment introduced by the new Act is the deletion of the provision in section 187 (1) (f) of the extant Act which disqualifies a substantial shareholder of a company from acting as trustee of a debenture trust deed. **Section 212** of the new Act which provides for the qualification for appointment as trustee of debenture trust deeds to which the company is a party no longer restricts substantial shareholders from acting in such capacity.

SAVINGS/TRANSITION PROVISIONS

With regards to the status of transactions already completed under the old regime, section 869 of the new Act preserves and validates all actions carried out pursuant to the provisions of the old Act. The section provides that all orders, rules, regulations, appointments, conveyances, mortgages, deed or arrangements made, as well as resolutions passed, directions given, proceedings taken, instruments issued, and anything done under the old Act shall continue to have effect as if same was made, passed, given, taken, issued or done under the new Act.

Unfortunately, however, the new Act failed to provide for transition provisions with regards to transactions commenced under the old Act but still pending. It is recommended that such activities be continued under the provisions of the old Act where such activities will not contravene the provisions of the new Act. But where such activities are likely to contravene the provisions of the new Act, prudence suggests that those activities be (re)made to comply with the new Act so as to avoid regulatory bottlenecks. This is because, even though the new Act does not contain a commencement date and has not yet been gazetted, by **section 2** of the Interpretation Act, it is deemed to have come into force on the day it was signed into law.

COMMENT

Commercial and business legislations are a key driver for attracting investments and growth in an economy. World over, it is well understood that there is a nexus between effective and dynamic business laws and economic development. This is why countries that seek to attract and retain investors ensure to review their business laws periodically to reflect modern global economic realities.

Considering the gigantic steps taken towards bringing Nigeria's corporate practice in tune with international best practices, there is no doubt that the passage into law of the new Companies and Allied Matters Act (CAMA) 2020 will go a long way to improve Nigeria's ranking in the World Bank's Doing Business Index and signal the country's commitment to repositioning itself as an investment destination.

REFERENCES

1. The bill was first passed by the Senate of the Federal Republic of Nigeria on May 15, 2018 and then by the House of Representatives on Tuesday, January 22, 2019 to much fanfare.
2. It is a product of an effective collaboration amongst the Nigerian Bar Association Section on Business Law (NBA-SBL), the Presidential Enabling Business Environment Council (PEBEC) and the National Economic Summit Group (NESG) that all worked together under the auspices of the National Assembly Business Environment Roundtable (NASSBER).
3. Nigeria presently ranks 131 in World Bank's 2020 Doing Business Report

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